

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE DALE BRAXTON,

Defendant-Appellant.

UNPUBLISHED

April 18, 2006

No. 259829

Saginaw Circuit Court

LC No. 02-022367-FH

Before: Murphy, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 17 months to 20 years’ imprisonment for the possession with intent to deliver cocaine conviction, 180 days in jail for the possession of marijuana conviction, and 13 months to 5 years’ imprisonment for the CCW conviction, those sentences to be served concurrently with one another but consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm defendant’s convictions, but remand for correction of the judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We reject defendant’s claim that the evidence was insufficient to sustain his convictions for CCW and felony-firearm. The CCW conviction was predicated on defendant carrying a gun in a motor vehicle. MCL 750.227(2). Although mere presence is insufficient to establish that a person carried a weapon in a motor vehicle, factors relevant to this determination are “(1) the accessibility or proximity of the weapon to the person of the defendant, (2) defendant’s awareness that the weapon was in the motor vehicle, (3) defendant’s possession of items that connect him to the weapon, such as ammunition, (4) defendant’s ownership or operation of the vehicle, and (5) the length of time during which defendant drove or occupied the vehicle.” *People v Butler*, 413 Mich 377, 390 n 11; 319 NW2d 540 (1982).

The felony-firearm conviction was predicated on defendant’s possession of the gun during his commission of the crime of possession with intent to deliver less than 50 grams of cocaine. Under MCL 750.227b(1), the prosecution was required to establish that defendant either carried or possessed the firearm at the time the felony was attempted or committed. The term “possession” encompasses both actual and constructive possession. *People v Burgenmeyer*,

461 Mich 431, 438; 606 NW2d 645 (2000). A defendant's reasonable access to a firearm and his knowledge of its location is sufficient to establish constructive possession. *Id.* at 437.

Viewed in a light most favorable to the prosecution, the evidence indicated that defendant was seated alone in the front passenger seat of a vehicle while two men stood outside the vehicle and a fourth man sat in the back seat. The three men watched defendant as he attempted to make a "blunt" with marijuana. An officer observed a gun between defendant's feet, so he seized the marijuana and the gun, as well as cocaine from defendant's coat sleeve, when taking defendant into custody. The evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was carrying the firearm in his vehicle when he committed the crime of possession with intent to deliver less than 50 grams of cocaine. *People v Hardiman*, 466 Mich 417, 428-429; 646 NW2d 158 (2002).

However, we agree with defendant that the trial court erred by ordering that his sentences for possession of marijuana and CCW were to be served consecutive to his felony-firearm sentence. The felony-firearm charge was predicated only on defendant's possession of a firearm during the crime of possession with intent to deliver cocaine. "[T]he Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony. . . . No language in the statute permits consecutive sentencing with convictions other than the predicate offense." *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). As the appropriate remedy, we remand this case to the trial court for the limited purpose of correcting defendant's judgments of sentence to specify that the sentences for possession of marijuana and CCW are to be served concurrently with the felony-firearm sentence. *Id.* at 465.

Affirmed in part and remanded for correction of the judgments of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray